

Supreme Court, U. S.  
FILED

SEP 2 1978

MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. **78-376**

FRED PABST, JR., *Appellant*,

v.

VERMONT COMMISSIONER OF TAXES, *Appellee*.

On Appeal from the Supreme Court of the State of Vermont

## JURISDICTIONAL STATEMENT

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**JURISDICTIONAL STATEMENT**

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**OPINIONS BELOW**

Appellant appeals from a judgment of the Supreme Court of the State of Vermont, which judgment affirmed in part and reversed in part the decision of the Washington (Vermont) Superior Court. Neither the opinion of the Vermont Supreme Court nor the opinion of the Washington (Vermont) Superior Court are as yet reported. Copies of both opinions are included in the Appendix, attached hereto.

**JURISDICTION**

**Nature of Proceeding and Statutory Basis Therefor**

This suit was initially brought by the Appellant (hereinafter referred to as the "taxpayer") against the Appellee (hereinafter referred to as the "Commissioner") pursuant to the provisions of Vermont Stats. Ann. Title 32, Ch. 190, § 7489 (1959). The suit constituted an appeal from certain

determinations of the Commissioner, denying the taxpayer's claims for refund with respect to Vermont gift taxes paid by the taxpayer in the following amounts:

1971 — \$ 347.88

1972 — \$230,663.71

1973 — \$165,791.92<sup>1</sup>

The taxpayer's refund claims were based on his contention that the Vermont Gift Tax, which became effective for the first time in 1971, violated various provisions of the Vermont and United States Constitutions. This contention was rejected by the Vermont Commissioner of Taxes and, on appeal, by the Washington (Vermont) Superior Court. The taxpayer appealed this latter decision to the Vermont Supreme Court, which partially affirmed and partially reversed the Superior Court. Specifically, the Vermont Supreme Court held that the failure of the Vermont Gift Tax Law to provide a particular exemption to a group of taxpayers (including the Appellant herein) was in violation of the equal protection provisions of Article XIV of the United States Constitution. The Vermont Supreme Court held, however, that the Gift Tax Law did not violate the other constitutional provisions upon which the taxpayer's claims were based and that, despite its violation of the equal protection provisions of the Fourteenth Amendment, the law as a whole was valid and enforceable. Thus, the case was remanded to the Superior Court for a recomputation of the taxpayer's tax liability in accordance with instructions developed by the Supreme Court, the purpose of which was to provide the taxpayer with the exemption found to be

<sup>1</sup> The 1973 taxes were not directly involved in the Order of the Vermont Supreme Court from which this appeal is taken. The parties, however, stipulated before that court that the results of the appeal with respect to the 1971-1972 refund claims would govern the disposition of the 1973 claims as well.

unconstitutionally denied to him. The taxpayer is appealing the decision of the Vermont Supreme Court to the extent that it held the Vermont Gift Tax Law to be partially valid and enforceable.

#### **Dates of Judgment to be Reviewed and Other Pertinent Actions**

On April 4, 1978, the Vermont Supreme Court entered an Order remanding the case to the Superior Court for the above-described recomputation. Both the taxpayer and the Commissioner moved for reargument, which was denied by an Order of the Vermont Supreme Court dated June 6, 1978. The Notice of Appeal herein was filed in the Vermont Supreme Court and the Washington (Vermont) Superior Court on August 30, 1978.

#### **Basis for Jurisdiction**

The jurisdiction of the Supreme Court to hear this appeal rests on 28 U.S.C. §1257(2). Although the Order of the Vermont Supreme Court from which this appeal is taken remanded the case to the Superior Court, nothing more than ministerial acts remain to be accomplished by the latter Court, so that the Supreme Court's Order is "final" within the meaning of the cited statute. See *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953).

#### **Statutory Provisions Involved**

Vermont Stats. Ann. Title 32, Ch. 190, § 7412 provides in relevant part as follows:

"For the calendar year 1971 and for each calendar year thereafter a tax is imposed upon the transfer of property by gift during such calendar year by any individual, resident or non-resident. The amount of this tax shall be measured by 30 percent of the federal gift tax liability of the taxpayer for the calendar year,

reduced by a percentage of all the taxpayer's transfers by gift for the calendar year which are not Vermont gifts."

The remainder of Title 32, Ch. 190 is set forth in relevant part in Appendix B.

### QUESTIONS PRESENTED

1. Do the retroactive elements of the Vermont Gift Tax Law violate the due process requirements of U.S. Const. amend. XIV, § 1?

2. Did the Vermont Supreme Court itself violate the U.S. Const. amend. XIV, § 1 or U.S. Const. Art. IV, § 4 in re-drafting by judicial fiat a unified State law found by it to be in partial violation of the U.S. Constitution?

3. Does the Vermont Gift Tax Law, in delegating significant elements of the State's legislative, judicial and administrative authority to non-Vermont governmental agencies, thereby violate U.S. Const. amend. XIV, § 1 or U.S. Const. Art. IV, § 4?

### STATEMENT OF THE CASE

The taxpayer, a Vermont resident, made substantial gifts to his family members, starting in 1947. Until 1971, Vermont had no gift tax, but there was a federal gift tax, imposed by the Internal Revenue Code on all gifts in excess of certain exclusions and exemptions.<sup>2</sup> The federal law first permitted each donor to exclude from his or her total gifts

<sup>2</sup> The federal gift tax was first adopted in 1924, but was repealed two years later. Rev. Act of 1924, § 319 et seq., 43 Stat. 253, 313, and Rev. Act of 1926, § 302(c), 44 Stat. 9, 70. The tax was reenacted in 1932 and has been in effect since. See generally Revenue Act of 1932, § 501 et seq., 47 Stat. 169, 245; Int. Rev. Code of 1939, §§ 1000 through 1031, 53 Stat. 47; Int. Rev. Code of 1954, §§ 2501-2524.

in any single period a specified amount of the gifts made to each individual donee.<sup>3</sup> Then, all gifts to all donees in excess of these annual exclusions were eligible for an aggregate exemption available to each donor. This latter exemption was available over the donor's lifetime, so that all gifts made by the donor in excess of the annual exclusions would be eligible for the exemption until the aggregate of such excess amounts over the years equaled the amount of the exemption; after that point, all gifts in excess of the donor's annual exclusions would be taxable.<sup>4</sup> Finally, tax would be computed on all taxable transfers made in a particular period; the applicable rate, however, would be determined not only by reference to taxable gifts made in that current period, but also by reference to all prior taxable gifts made by that donor since June 6, 1932.<sup>5</sup>

<sup>3</sup> In all years relevant to the instant case, this annual exclusion was \$3,000 per donee. Since 1954, the exclusion has been contained in Int. Rev. Code of 1954, § 2503(b).

<sup>4</sup> In all years relevant to the instant case, the lifetime exemption was \$30,000. In the years 1954 through 1976, this exemption was contained in Int. Rev. Code of 1954, § 2521, 68A Stat. 3.

<sup>5</sup> The computation of the federal tax on gifts made in all years relevant to the instant case can be illustrated as follows. First, the taxable gifts for a calendar quarter were calculated. Second, the taxable gifts for all prior periods since June 6, 1932 (the date the gift tax was reenacted) were similarly calculated. Third, the amounts determined from steps one and two were totaled. Fourth, a hypothetical tax would be calculated on the total amount determined in step three; during the relevant years, the tax rate varied from 2¼ percent on total (current and prior) gifts of less than \$5,000, to 57¾ percent on total gifts of over \$10,000,000. Fifth, a tax would be calculated in a similar manner on just the prior gifts, as determined in step two. Sixth, the tax determined in step five would be subtracted from the tax determined in step four, and the balance would equal the tax on the current gift. See Int. Rev. Code of 1954, § 2502, 68A Stat. 3 and Treas. Regs. § 25.2502-1(a) (1958).

The pre-1971 gifts made by the taxpayer (after subtracting the federal annual exclusions), and his utilization of the federal lifetime exemption, were as follows:

Year	Total Gifts in Excess of Exclusions	Lifetime Exemption Available and Utilized	Taxable Gift
1947 .....	\$ 2,900.00	\$ 2,900.00	\$ —0—
1948 .....	29,167.50	21,667.50	7,500.00
1949 .....	113,400.00	5,432.50	107,967.50
1950 .....	250.00	—0—	250.00
1951 .....	40,000.00	—0—	40,000.00
1962 .....	51,021.56	—0—	51,021.56
1969 .....	341,323.51	—0—	341,323.51
1970 .....	67.50	—0—	67.50
	<u>\$578,130.07</u>	<u>\$30,000.00</u>	<u>\$548,130.07</u>

Effective as of January 1, 1971, Vermont imposed a state gift tax for the first time.<sup>6</sup> Section 7412 of the new law provided that the new tax would equal 30 percent of the taxpayer's federal gift tax liability for the calendar year. Exemptions were provided for "non-Vermont" gifts, none of which are involved in this case. No separate tax rate schedule was enacted, nor were any specific provisions made for exemptions or exclusions.

In 1971, 1972 and 1973, the taxpayer made additional gifts to his family members. As illustrated above, no federal lifetime exemption was available, since that exemption had been fully utilized by the taxpayer in prior years. As also illustrated above, the existence of the taxpayer's pre-1971 gifts and the applicability of the cumulative federal rate system had the result of subjecting the taxpayer to a

<sup>6</sup> Vermont Acts of 1970, No. 269, adding Title 32, Ch. 190, Subchapter 2, Vermont Statutes Ann. (1959).

higher federal gift tax bracket in 1971 than if those pre-1971 gifts had not been made. The taxable gifts made by him, the applicable federal rate and the federal taxes paid on those gifts were as follows:

Year	Federal Taxable Gift	Federal Gift Tax Rate	Federal Gift Tax
1971 .....	\$ 8,752.50	26 $\frac{1}{4}$ %	\$ 1,159.60
1972 .....	2,307,950.00	39 $\frac{3}{4}$ %	768,879.04
1973 .....	1,279,052.72	47 $\frac{1}{4}$ %	552,639.73

Pursuant to the new Vermont law, the Vermont tax was computed at 30 percent of the federal tax, so that the Vermont tax payable for each of these three years was as follows:

1971 .....	\$ 347.88
1972 .....	\$230,663.71
1973 .....	\$165,791.92

It is obvious that these Vermont taxes were significantly higher than would be the case for a Vermont donor who made identical gifts in 1971, 1972 and 1973, but who had made lesser or no taxable gifts in pre-1971 years.

The taxpayer paid the above Vermont taxes and then filed timely petitions for refund pursuant to Vermont Stats. Ann., Title 32, Ch. 190, § 7488 (1959), claiming that the new Vermont Gift Tax violated several provisions of the United States and Vermont Constitutions. Specifically, the taxpayer's refund petitions claimed (i) that, by adopting the federal cumulative rate structure, which is determined in part by reference to pre-1971 transactions, the Vermont legislature was unconstitutionally imposing a retroactive tax, (ii) that, by adopting the federal cumulative rate structure, *and* by not affording any exemption to taxpayers who had utilized their federal exemption in pre-1971 years,

the Vermont legislature was unconstitutionally denying to the taxpayer the equal protection of its laws and (iii) that, in providing that decisions and actions by the United States Congress, the federal judiciary and the Internal Revenue Service would effectively bind the Vermont legislature, judiciary and Department of Taxes in the determination and collection of Vermont taxes, the Vermont legislature was unconstitutionally delegating responsibilities which should have been exercised by these state entities.

These refund claims were denied by the Vermont Commissioner of Taxes in two determinations, one relating to 1971 and 1972 and one relating to 1973. The taxpayer, pursuant to Vermont Stats. Ann. Title 32, Ch. 190, § 7489, took two separate appeals (later consolidated) to the Washington (Vermont) Superior Court, and in its briefs to that Court the taxpayer repeated each of the constitutional arguments presented in his refund claims. The Superior Court, by Order dated November 23, 1976, affirmed the denial of the taxpayer's refund claims.

The taxpayer thereupon filed a timely Notice of Appeal to the Vermont Supreme Court, and the constitutional arguments initially raised in the taxpayer's refund claims were presented to the Supreme Court on brief. That Court held as follows:

First, although the Court first stated that it would not consider the alleged unconstitutionality of the delegation of powers, it then proceeded to do so, holding that the delegation violated neither the Vermont Constitution nor Article 4, § 4 of the United States Constitution.

Second, it held that, in failing to grant a lifetime exemption to taxpayers who had fully utilized their federal lifetime exemption in pre-1971 years, the Vermont law violated

the equal protection provisions of the United States Constitution, amendment XIV, § 1, since there was no appropriate legislative purpose behind that denial.

Third, it held that the law did not violate the equal protection provisions of the United States Constitution, amendment XIV, § 1, by virtue of utilizing the pre-1971 gifts in determining the effective tax rate. The basis for this conclusion was that the legislature could properly discriminate among taxpayers on the basis of their ability to pay and that the extent of pre-1971 gifts could properly have been considered by the legislature as an appropriate measure of that ability.

Fourth, it held that the law in question, in so utilizing the pre-1971 gifts, did not violate the due process provisions of the U.S. Constitution, amendment XIV, § 1. The Court agreed that

“... the Vermont tax scheme has a retroactive element, because it attributes consequences to the making of gifts prior to 1971.”

The Court found, however, that this retroactivity was not so “harsh and oppressive” as to constitute a denial of due process inasmuch as it was unlikely that foreknowledge of the 1971 law would have affected taxpayer's pre-1971 actions. Also the Court found that the taxpayer could have avoided the tax on the pre-1971 transactions by not making any post-1970 gifts.

Fifth, the Court determined that it did not need to nullify the whole gift tax structure because of its finding as to the discriminatory nature of the law as it applied to the lifetime exemption. Instead, it remanded the case to the Superior Court and directed that Court to recompute the taxpayer's liability in accordance with a formula, the effect of which

was to grant to the taxpayer the legislatively-denied exemption.

Both the taxpayer and the State moved for reargument, the taxpayer arguing that the Court's "redrafting" of the law, in total absence of any legislative support therefor, was improper. The motions for reargument were denied.

### SUBSTANTIALITY OF FEDERAL QUESTIONS

1. *Retroactivity.* The taxpayer was required to pay a substantially greater Vermont tax in 1971, 1972 and 1973 than he would have had to pay if he had made no pre-1971 gifts. Based on this uncontested conclusion, the Vermont Supreme Court agreed that the 1971 tax had a "retroactive element", since it "attributes consequences to the making of gifts prior to 1971". Nevertheless, the Court concluded that the tax law did not violate the due process provisions of the Fourteenth Amendment, since the retroactivity was not sufficiently "harsh and oppressive". This conclusion is contrary to the decision of this Court in *Blodgett v. Holden*, 275 U.S. 142 (1927) and *Untermeyer v. Anderson*, 276 U.S. 440 (1928), holding retroactive gift taxes to be unconstitutional. As stated in *Blodgett v. Holden*,

"It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing." 275 U.S. at 147.

A similar conclusion is required here.

The Vermont Court distinguished *Blodgett v. Holden* and *Untermeyer v. Anderson* on two grounds.

First, the Court correctly cited *Welch v. Henry*, 305 U.S. 134 (1938), as holding that, under those two prior decisions,

a retroactive tax would be found unconstitutional only if the taxpayer was "surprised" by the enactment and if it was likely that his prior conduct would have been altered by a foreknowledge of the later-enacted law. The Court assumed, accurately, that the first of these tests was met here, but it held that the second test was not met, since no rational taxpayer would have varied his pre-1971 gift program because of such foreknowledge. This conclusion is erroneous. The decision of an affluent taxpayer as to whether or not (or when) to make substantial gifts is governed by a complex interplay of factors, including the effective federal and state gift tax rates, the effective estate tax rates, the taxpayer's age and health and so on. To assume that a variance in any one of these factors would not affect the ultimate decision is surely without basis, considering the realities of sophisticated tax planning. To take one possibility, the taxpayer, armed with knowledge of the 1971 law, would surely have considered whether to accelerate his 1971, 1972 and 1973 gifts into an earlier year, in order to avoid any Vermont tax on those gifts. But, since that decision would have accelerated his federal tax liability, the taxpayer would compare the overall effect of acceleration to the overall effect of deferral, and it could well be that the extra costs of deferral created by the retroactive nature of the Vermont tax would be the determining factor in deciding upon his course of action. In short, the taxpayer's pre-1971 gift planning *would* have been affected (whether or not modified) by a foreknowledge of the retroactive nature of the 1971 law and, in absence of such foreknowledge, the law must be found unconstitutional.

The second ground used by the Vermont Court to avoid the holdings in *Blodgett v. Holden* and *Untermeyer v. Anderson* was that the taxpayer could have avoided the charge

on his pre-1971 gifts by not making any later gifts<sup>7</sup> presumably demonstrating again that the retroactive elements of the 1971 law were not unduly "harsh or oppressive". If this defense is accurate, however, it would permit a taxing authority to cure any retroactive tax merely by making it applicable only to taxpayers who "voluntarily" take some later, constitutionally permitted, step. The defect in this reasoning was well-stated by the Ohio Supreme Court in *Lakengren, Inc. v. Kosydar*, 44 Ohio St. 2d 199, 339 N.E. 2d 814 (1975), disposing of a similar argument by the State of Ohio. As the Ohio court said,

"The obvious difficulty with that contention is that it allows the state to impose new taxes upon income earned at any time in the past simply by stating that the levy is a payment for future privileges. The prohibition against retroactive laws is not a form of words; it is a bar against a state's imposing new duties and obligations upon a person's past conduct and transactions, and it is a protection for the individual who is assured that he may rely upon the law as written and not later be subject to new obligations thereby."

While the Ohio court was referring to state income taxes and to the Ohio Constitution, the rationale applies as well to retroactive gift taxes under the Fourteenth Amendment.

2. *Judicial Legislation.* The Vermont statute in question, namely Vermont Stats. Ann. Title 32, Ch. 190, § 7412, provided simply that the Vermont gift tax "shall be measured by 30 percent of the federal gift tax liability of the taxpayer for the calendar year." The Vermont Supreme Court

<sup>7</sup> A somewhat related argument was made by the Commissioner below, to the effect that the tax was not retroactive at all, in that it was imposed only on the post-1970 gifts, and was merely measured in part by the earlier gifts. This, of course, ignores economic reality in favor of form and the Court below concluded accurately that this distinction "does not dispose of appellant's claim".

accurately noted that the effect of this language was to deny a lifetime exemption to any taxpayer who had utilized the federal exemption in earlier years, while permitting an exemption to any taxpayer who had not utilized the exemption. The Court also concluded that there was no rational legislative purpose behind this discrimination and, the Court concluded, this constituted a denial of equal protection in violation of the Fourteenth Amendment. Thereupon, however, the Court determined that this constitutional defect did not require it to strike down the entire tax. Instead, despite the clear, unambiguous and unseverable language of § 7412, the Court remanded the case to the trial court, instructing it to recompute the taxpayer's liability as if the Vermont law *did* permit the exemption.

As has been seen, the Vermont Court's conclusion cannot be justified as one of severability, nor can it be supported as merely construing a statute as not intended to reach subjects which the legislature is constitutionally without power to touch. Cf. *Schuylkill Trust Co. v. Pennsylvania*, 302 U.S. 506 (1938). Rather, the Court determined that it would just rewrite the statute by judicial fiat, adding a specific dollar exemption where none was provided. The taxpayer submits that this approach itself violates the basic concepts of due process of law. It is true that the Fourteenth Amendment does not guarantee that a lower court's determination will be devoid of error. But it is also true that, if an error is so gross and obvious, coming close to (or passing) the boundary of arbitrary action, it *will* ripen into a constitutional violation. See *Roberts v. New York City*, 295 U.S. 264, 277 (1935). And that, it is submitted, is what occurred here.

Moreover, the rewriting of tax legislation by the judiciary is in violation of the constitutional requirement that every state shall maintain "a Republican Form of Government",

U.S. Const. Art. IV, § 4. If there is any principle that is embodied in that phrase, it is that a citizen of a state is entitled to have legislative matters determined by his or her elected representatives. It is recognized that this Court has stated its unwillingness to invalidate a state action on the basis of this constitutional provision. Appellant submits, however, that this self-imposed reluctance has no applicability where a state court, on its own and without legislative sanction, has assumed an indisputably legislative role by adding an exemption to a statute which contains no hint of such. For further discussion of this point, the Court is respectfully directed to the next portion of this statement.

3. *Delegation.* The taxpayer argued below that, in enacting the Vermont Gift Tax, the state legislature delegated significant elements of its authority and the authority of the Vermont judiciary and administrative departments to non-Vermont agencies, in violation of the Vermont and United States Constitutions.<sup>8</sup>

<sup>8</sup> The Vermont law, unique among the states, does not merely incorporate federal tax definitions. Instead, as noted, it also effectively adopts the entire federal tax rate structure. And, perhaps even more importantly, it makes the interpretations of the law by the federal judiciary and by the federal Internal Revenue Service absolutely binding upon Vermont agencies in their interpretation and administration of the tax. See Title 32, Ch.190, § 7492 (1959), providing in relevant part that:

"A determination by the United States which establishes the amount of a taxpayer's taxable gifts . . . or gift . . . tax liability under the laws of the United States shall be binding on the taxpayer and the state in calculating the taxpayer's liability to Vermont under this Chapter. For purposes of this section, 'determination by the United States' means

(A) A decision by the Tax Court of the United States or a judgment, decree or other order by any United States court of competent jurisdiction which has become final.

(B) A closing agreement under Section 7121 of the Internal Revenue Code of 1954."

While the Vermont Supreme Court stated at one point that it would not consider this issue, presumably because the taxpayer lacked standing to raise such, the Court did then proceed to consider taxpayer's arguments and held that the Vermont system was not constitutionally inappropriate. This conclusion is erroneous for two reasons.

First, the Vermont system, which can effectively bar a Vermont citizen from challenging a Vermont tax liability in a Vermont court, surely is a violation of the due process requirements of the Fourteenth Amendment to the U.S. Constitution. The taxpayer recognizes that this Court has held that, in general, the question of delegation of authority by a state agency does not raise Fourteenth Amendment questions. See, e.g., *Bradley v. Richmond*, 227 U.S. 477 (1913). These cases, however, universally pertain to delegations of legislative authority to other local entities, and it is clear that a statute such as that under discussion here raises far different questions, which have never been examined by this Court.

Second, the Vermont system also raises significant questions under Article IV, § 4, of the U.S. Constitution, requiring a state to maintain "a Republican form of government". Once again, the taxpayer recognizes the reluctance of this Court to involve itself in questions raised under this so-called "guarantee provision", but it is submitted that such reluctance should not bar a full review of the issue here at hand. For one thing, a decision by the Court that Vermont's gift tax system was not "Republican" in form would raise none of the extraordinarily difficult practical and "political" problems envisioned by the Court (and cited as a basis for its reluctance to consider the issue) in such cases as *Pacific Telephone Co. v. Oregon*, 223 U.S. 118 (1912). Moreover, it has been noted by commentators that the prec-

edents in which this doctrine of self-restraint were promulgated may already have been undercut to a significant degree by cases such as *Baker v. Carr*, 369 U.S. 186 (1962). See Tribe, *American Constitutional Law*, p. 300, n.3 (1978). Indeed, this latter authority has noted that the guarantee clause may constitute a better method of resolving delegation issues than due process. *Id.*, p. 1141, n.7. Accordingly, it is respectfully suggested that the Court may wish to re-examine its doctrine of non-involvement in guarantee clause issues, especially to the limited extent required by the facts at hand.

It should also be pointed out that the issue presented here is of very significant importance on a national level. The growing trend of states to relieve themselves of the burden of local tax administration and collection has resulted in a myriad of uncertainties. See Cohen, "State Income Tax Conformity: Knotty Problems in the Branches of the Federal Tree", 13th Annual William and Mary Tax Conference (1968). Indeed, it is presumably these uncertainties which in large measure, have resulted in the failure of any state to elect the "Federalization" provisions of the Internal Revenue Code of 1954, §§ 6361-6365. A definitive Supreme Court opinion on that complex issue would surely be of significant benefit in this muddled area.

Respectfully submitted,

ROBERT A. SCHNUR  
*Counsel for Appellant*

**ENTRY ORDER**  
SUPREME COURT DOCKET NO. 355-76  
APRIL TERM, 1978

FRED PABST, JR.

v.

COMMISSIONER OF TAXES

Appealed From:  
Washington  
Superior Court  
Docket No.  
C-147-73 Wnm  
and  
C-5-74 Wnm

In the above entitled case the Clerk will enter:

Appellant's and Appellee's motions to reargue denied.

BY THE COURT:

RUDOLPH J. DALY  
Rudolph J. Daley, Associate Justice

ROBERT W. LARROW  
Robert W. Larrow, Associate Justice

FRANKLIN S. BILLINGS, JR.  
Franklin S. Billings, Jr., Associate  
Justice

WILLIAM C. HILL  
William C. Hill, Associate Justice

F. RAY KEYSER  
F. Ray Keyser, Associate Justice  
(Retired) Specially Assigned

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 355-76

DECEMBER TERM, 1977

FRED PABST, JR.

v.

COMMISSIONER OF TAXES

Appealed From:  
Washington  
Superior Court  
Docket No.

In the above entitled case the Clerk will enter:

*This case is reversed and remanded for further proceedings in accordance with the instructions set out in the opinion. Counsel have stipulated that the 1973 gift tax paid by the appellant shall be subject to the ruling of the Court in this opinion and the Court so orders.*

**FOR THE COURT:****WILLIAM C. HILL**

William C. Hill, Associate Justice

**Concurring:****RUDOLPH J. DALY**

Rudolph J. Daley, Associate Justice

**ROBERT W. LARROW**

Robert W. Larrow, Associate Justice

**FRANKLIN S. BILLINGS**

Franklin S. Billings, Jr., Associate Justice

**F. RAY KEYSER**F. Ray Keyser, Associate Justice  
(Retired) Specially Assigned**No. 355-76**

FRED PABST, JR.

v.

COMMISSIONER OF TAXES

Supreme Court  
On Appeal From  
Washington  
Superior Court  
December Term,  
1977

Present: Daley, Larrow, Billings, and Hill, JJ., and Keyser, J. (Retired), Specially Assigned

HILL, J. Appellant seeks refund of amounts paid under the Vermont gift tax law (32 V.S.A. § 7401 *et seq.*) for the years 1971 and 1972. The basis of appellant's claim is that certain features of Vermont's gift tax statute are unconstitutional.

In 1970, the Legislature passed laws providing for the assessment of estate and gift taxes. Public Acts 1970 (Adj. Sess.) No. 269 § 1, now 32 V.S.A. § 7401 *et seq.* The gift tax was made applicable to all gifts made on or after January 1, 1971. Public Acts 1970 (Adj. Sess.) No. 269 § 3 (see note to 32 V.S.A. § 7401). 32 V.S.A. § 7412 provides<sup>1</sup> that the gift tax payable for each calendar year shall be an amount equal to thirty percent of a taxpayer's federal gift tax liability for that calendar year, reduced by the percentage of the taxpayer's total gifts which are not "Vermont gifts." A general provision of the estate and gift tax law (32 V.S.A. § 7475) provides that if a taxpayer's Vermont gift tax liability for any year is increased, by virtue of a change in federal law, over what the taxpayer would have paid had federal law remained as it was on January 1, 1971, then the taxpayer shall receive a credit equal to the amount of the increase. Each of appellant's constitutional arguments arises out of the "piggyback" features of the Vermont law.

<sup>1</sup> All references to state or federal gift tax laws are to those laws as they existed in the years 1971 and 1972 unless otherwise noted.

Appellant made gifts in 1971 and 1972 and paid federal and, under protest, Vermont gift taxes for both of those years. For each year the Vermont gift tax paid was equal to thirty percent of the federal gift tax paid, there being no non-Vermont gifts. Federal gift tax liability for the years 1971 and 1972 was calculated, on a quarterly basis, by a three-step process. First, all federal taxable gifts made by the taxpayer since 1932 (the first year in which the federal gift tax law was applicable), *including* gifts made in the quarter for which the tax was being calculated, were added together; a tax on that sum was computed by reference to a rate schedule set out in 26 U.S.C. § 2502 (1970). Second, all federal taxable gifts made by the taxpayer since 1932, *excluding* gifts made in the quarter for which the tax was being calculated, were added together; a tax on that sum was computed by reference to the same rate schedule. Finally, the taxpayer's actual gift tax liability for the quarter was computed by subtracting the amount of the second computed tax from the amount of the first. The rate schedule used in these calculations was progressive, the rate of the tax rising as the amount of total federal taxable gifts rose.

### I.

Appellant first argues that the Vermont Legislature has unconstitutionally delegated its responsibilities by adopting the federal gift tax structure and rate schedule and by mandating that federal judicial or administrative determinations shall be conclusive on questions of gift tax liability. He supports this claim with several examples illustrating how changes in federal law might affect the Vermont tax scheme. However, appellant does not cite any actual changes in the federal gift tax law during the years 1971 and 1972 which affected him. Furthermore, in the hypotheticals which appellant presents, the alleged injury resulting from a

change in federal law is to the State treasury, not to the pocketbook of the individual taxpayer. As we said in *Clark v. City of Burlington*, 101 Vt. 391, 412, 143 A. 677, 685 (1928), appellant cannot base a constitutional challenge on theoretical irregularities, but must show that he is unfavorably affected.

Appellant also contends that 32 V.S.A. § 7492, which makes federal judicial and administrative determinations binding on the State, violates the guaranties of self-government, Vermont Const., ch. I, art. 5, and republican government, U.S. Const., art. 4, § 4. However, appellant in this case does not cite any federal judicial or administrative determinations adverse to him. Therefore, we will not consider the alleged invalidity of this delegation.

The only aspect of the Vermont gift tax law which is involved in this case and which could be said to represent a delegation of power to federal authority is the "piggy-back" method of computing Vermont gift tax liability. 32 V.S.A. § 7412. There are numerous cases holding that a state may use the federal determination of income in computing state income tax liability. See *Thorpe v. Mahin*, 43 Ill. 2d 36, 49, 250 N.E.2d 633, 640 (1966), and cases cited therein; see also *Wheeler v. State*, 127 Vt. 361, 249 A.2d 887 (1969). In structuring the Vermont gift tax law, the Legislature has "borrowed" not only the federal determination of taxable gifts but also the federal rate schedule. In view of the safeguards against increased gift tax liability provided by 32 V.S.A. § 7475 (which effectively freezes the applicable rate schedule as it appeared on January 1, 1971, regardless of changes in the federal law), we think the "borrowing" challenged here affects the taxpayer's rights no differently than that approved in the cases cited above. The Vermont Legislature has simply chosen to make the

computation required of a Vermont gift tax payor the taking of a percentage, rather than the reference of the amount of taxable gifts to a separate Vermont rate schedule. This is not an unconstitutional delegation of responsibility to the federal government.

## II.

Appellant's second claim of error is based on the contention that two aspects of the Vermont gift tax law give rise to arbitrary discrimination between taxpayers in violation of the equal protection clause of the United States Constitution and the uniformity clause of the Vermont Constitution.<sup>2</sup> Both complained-of aspects result from the incorporation of the federal gift tax scheme into the Vermont law. One of appellant's equal protection arguments challenges the Vermont law's treatment of the federal lifetime exemption.<sup>3</sup> On this point, appellant alleges discrimination between himself and a hypothetical Vermont taxpayer who, though making the same pre-1971 and post-1971 gifts as appellant, did not use all of his lifetime exemption prior to 1971 and was therefore able to apply part or all of the exemption to "Vermont gifts" as well as federal gifts. Appellant's other equal protection argument challenges Vermont's use of the taxpayer's annual federal gift tax liability, which in part depends on the amount of gifts made prior to the effective date of the Vermont law, to determine Vermont gift tax liability. Here appellant emphasizes the difference between

<sup>2</sup> The limitations placed upon the State's powers of taxation by the uniformity clause of the Vermont Constitution, ch. I, art. 9, are the same as those embodied in the equal protection clause of the United States Constitution. *In re Estate of Eddy*, 135 Vt. ,

380 A.2d 530, 534 (1977); *State v. Auclair*, 110 Vt. 147, 161, 4 A.2d 107, 114 (1939); *Clark v. City of Burlington*, 101 Vt. 391, 405, 143 A. 677, 683 (1928).

<sup>3</sup> In the years with which we are concerned, the amount of the exemption was \$30,000. 26 U.S.C. § 2521 (1970) (repealed 1977).

his liability under the Vermont gift tax law and the liability of a hypothetical Vermont taxpayer who, though making the same amount of Vermont taxable gifts as appellant in 1971 and 1972, would have paid less Vermont tax if he had made less federal taxable gifts in years prior to 1971.

Appellant contends that he has been arbitrarily denied the right to apply his lifetime exemption to his Vermont gifts. This contention may be illustrated by the following example. Vermont taxpayers A and B make their first taxable Vermont gifts, each in the amount of \$30,000, in 1970. B claims his \$30,000 exemption and pays no federal gift tax, but A declines to use any of his lifetime exemption,<sup>4</sup> paying federal gift taxes on the full \$30,000. In 1971, A and B again give \$30,000 each in taxable Vermont gifts, but now A claims his full \$30,000 exemption, with the result that both his federal and his Vermont gift tax liabilities are zero. B, on the other hand, having used up all of his lifetime exemption in 1970, must pay federal tax on his \$30,000 gift and also Vermont tax amounting to thirty percent of his federal liability. The result is that while A and B made exactly the same gifts, pre-1971 and post-1971, Vermont and non-Vermont, and paid the same amount of federal gift tax (on cumulative taxable gifts of \$60,000 less the \$30,000 exemption), B was required to pay Vermont gift tax in 1971 while A was able to escape all Vermont gift tax liability by claiming his exemption. Appellant, who used up all of his \$30,000 exemption prior to 1971, likens his position to that of taxpayer B.

When a person subject to a statutory classification challenges that classification on equal protection grounds, and where there is no suspect class or fundamental right in-

<sup>4</sup> Although federal law on the subject is not conclusive, it appears that the taxpayer could apply the \$30,000 lifetime exemption whenever he chose. *Phipps v. Commissioner*, 127 F.2d 214, 215 (10th Cir.), *cert. denied*, 317 U.S. 645 (1942).

volved, we must uphold the classification if we find that it serves any of the purposes that are conceivably behind the statute in question, and that are within the powers of the legislature to pursue. *Andrews v. Lathrop*, 132 Vt. 256, 259, 315 A.2d 860, 862 (1974).

The State in this case does not suggest any justification for withholding the exemption for post-1971 Vermont gifts from taxpayers who previously claimed their federal lifetime exemption while granting that exemption to those taxpayers who can be distinguished only by their refusal to make use of the federal exemption prior to 1971. Instead the State argues that there is no real discrimination here because "taxpayers with comparable total federal taxable gifts will incur the same Vermont gift tax whether the exemption is deducted before or after 1971." The example presented above demonstrates that this claim of the State is in error. The State confuses the two effects of the lifetime exemption. To the extent that claiming the exemption reduces the total federal taxable gifts and therefore lowers the rate of taxation (the rate rising as the amount of total federal taxable gifts rises), the State is correct. Two taxpayers making the same gifts will be subject to the same rate if both have claimed the exemption regardless of when each claimed it. However, the claiming of the exemption also places \$30,000 beyond the reach of the taxing authority in the year or years in which the exemption is claimed. If a taxpayer is able to take his exemption after 1971, he escapes the grasp of the State taxing authority as well as the federal. If the taxpayer exercised his right to claim the exemption before 1971, as did appellant in this case, he is denied the opportunity to exempt any gifts from the State gift tax.

We must still decide if any of the purposes of the Vermont gift tax scheme are served by this apparent discrimination between taxpayers. In its general discussion of ap-

pellant's equal protection claims, the State relies on *Wheeler v. State*, *supra*, 127 Vt. 367, 249 A.2d 887, in which we held that taxpayers with similar Vermont taxable incomes could be taxed at different rates because their differing federal taxable incomes indicated differences in their respective "ability to pay." However, we cannot see in this case how the pre-1971 claim of an exemption indicates that a taxpayer such as appellant has a greater ability to pay than a taxpayer making similar gifts who, though he could have taken the exemption, chose not to. It is just as likely if not more likely that the taxpayer choosing not to claim the exemption would have the greater ability to pay.

The State also relies on the ease of administration—both from the point of view of the taxpayer and the State—which adheres in the Vermont gift tax scheme. We fail to see how the discriminatory treatment of appellant in regard to the \$30,000 exemption serves the purpose of ease of administration. Nor is it enough to say that to treat the appellant fairly would have added complexity to the statute. See *Stewart Dry Goods v. Lewis*, 294 U.S. 550, 560 (1955). The differing treatment with respect to the lifetime exemption seems to us to be exactly the kind of arbitrary discrimination which is proscribed by the equal protection clause of the United States Constitution. We hold that insofar as it extends the \$30,000 exemption from the Vermont gift tax to some taxpayers while withholding it from appellant, the Vermont gift tax denies equal protection and is therefore unconstitutional.

We now consider the argument that the use of annual federal gift tax liability in calculating Vermont liability results in discrimination between appellant and another taxpayer with comparable post-1971 Vermont taxable gifts who made less pre-1971 taxable gifts. This differing treatment results because the method used in computing federal gift

tax liability is designed so that the effective rate of taxation on gifts made in a particular year rises as the total amount of federal taxable gifts made since 1932 rises. Since the Vermont gift tax is a flat thirty percent of the federal tax (assuming all federal gifts for the year were Vermont gifts), the Vermont "rate of taxation" is directly determined by the federal rate and therefore by past as well as present federal taxable gifts.

Again we must ask whether this differing treatment serves a permissible legislative purpose. *Andrews v. Lathrop*, *supra*, 132 Vt. at 259, 315 A.2d at 862. We think that one of the purposes of the Vermont estate and gift tax law enacted in 1970 was to collect revenue for the State through a comprehensive scheme to prevent the untaxed transfer of wealth. In setting up such a scheme for the collection of revenue, the Legislature may vary the rates of taxation to which taxpayers are subject according to the relative ability of the taxpayers to pay. *Wheeler v. State*, *supra*, 127 Vt. at 365, 249 A.2d at 890. Ability to pay income taxes for a given year may be indicated by a taxpayer's total income—Vermont and non-Vermont—for that particular year. *Id.* It is conceivable that in enacting the gift tax the Legislature concluded that the value of all gifts given by a taxpayer indicates his ability to pay tax on current gifts. Appellant argues that the value of past gifts does not indicate present ability to pay. Such a judgment is for the Legislature to make. We cannot say that this means of determining the rate of taxation is so unrelated to the permissible purpose of taxing according to ability to pay that it is arbitrary and capricious. We hold that the use of federal gift tax liability in computing Vermont gift tax liability, although classifying taxpayers according to past activity, is reasonable and does not result in a denial of equal protection.

### III.

In his third argument appellant again challenges the constitutionality of the use of past gifts to determine the current rate of taxation, on the ground that this aspect of the gift tax law is unconstitutionally retroactive. Appellant also challenges Vermont's treatment of the federal \$30,000 exemption on this ground, but since we have held that aspect of the gift tax law unconstitutional as a denial of equal protection, *supra*, we need not consider it here.

A retroactive law is one which attributes consequences to situations existing or transactions taking place before the law went into effect. Ballard, *Retroactive Federal Taxation*, 48 Harv. L. Rev. 592 (1935). A taxing scheme may be retroactive without being unconstitutional. *Welch v. Henry*, 305 U.S. 134, 146 (1938). "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Id.* at 147.

Appellant argues that the Vermont gift tax as applied to him is in practical effect a tax on prior gifts. Relying on this characterization he cites the cases of *Blodgett v. Holden*, 275 U.S. 142 (1927), and *Untermeyer v. Anderson*, 276 U.S. 440 (1928). In these cases the Court invalidated a congressional attempt to tax gifts made prior to the enactment of the federal gift tax. However, the case at bar is distinguishable from *Blodgett* and *Untermeyer*, *supra*. In those cases the challenged gift tax was directly imposed on gifts made prior to the enactment of the gift tax law. Having made these gifts, the taxpayer was given no choice but to pay the tax. Here the State has not taxed the appellant on gifts made prior to 1971. Under the Vermont gift tax law, pre-1971 gifts affect the rate at which post-1971 gifts will be taxed, but they are not themselves subjected to a tax.

While this difference undermines the argument that *Blodgett* and *Untermeyer, supra*, are controlling, it does not dispose of appellant's claim. We agree that the Vermont tax scheme has a retroactive element, because it attributes consequences to the making of gifts prior to 1971. The consequence which is decreed is the raising of the rate of taxation on gifts made after 1971. We must ask if the burden placed on appellant here is so harsh and oppressive that it constitutes a denial of due process.

The harshness and oppressiveness of retroactive taxation depends on two factors: the degree to which the taxpayer is surprised by the law attributing consequences to his past conduct, *Blodgett v. Holden, supra*, 275 U.S. at 147, and the likelihood that the taxpayer would have altered that conduct if he had foreseen the retroactive features of the challenged law. *Welch v. Henry, supra*, 305 U.S. at 147-48. Under these criteria appellant has not demonstrated sufficient oppressiveness to require us to declare the gift tax law unconstitutional.

Although we must assume that appellant was "surprised" by the retroactive features of the Vermont gift tax in 1970, it is unlikely that foreknowledge would have altered appellant's conduct with respect to his pre-1971 gifts. This is best illustrated if we examine the options which would have been open to appellant had he been aware, at any time prior to 1971, of the Vermont gift tax scheme to become applicable in that year. Appellant could have altered his pre-1971 gift-giving conduct in one of two ways.<sup>5</sup> He could reduce the amount of gifts given, thereby reducing the effective

<sup>5</sup> Appellant's hypothetical "altered conduct" might also have included different use of his \$30,000 federal exemption. However, such a possibility would be relevant only to the constitutionality of Vermont's treatment of that exemption, an issue which we have already resolved.

rate of taxation to which his post-1971 Vermont gifts would be subject. Alternatively, he could increase the amount of gifts given prior to 1971. This conduct (if the increased amount given represented gifts that otherwise might have been given after the effective date of the Vermont gift tax) would reduce the amount of post-1971 gifts subject to the Vermont tax. We do not find credible either of these suggested alternate modes of conduct.

In order for appellant's contention that his conduct would have been altered by foreknowledge of the statute to be persuasive on the issue of retroactive unconstitutionality, his suggested alternate conduct might be attributable to the retroactive feature of the statute. The retroactive feature challenged here is the use of pre-1971 gifts to determine appellant's post-1971 rate of taxation. Appellant's hypothetical decision to reduce his pre-1971 gifts could be attributable to the retroactive feature of the statute only if he anticipated giving gifts after 1971. If he did not intend to give post-1971 gifts, he could not be concerned about his post-1971 rate of taxation. Under these circumstances, he could not say that he would have been moved to reduce his pre-1971 giving by the knowledge that his post-1971 rate of taxation would be lower.

If appellant *did* anticipate giving post-1971 gifts, it is still not believable that he would have reduced his pre-1971 gift giving in order to keep low his post-1971 rate. This is because every dollar which we are to suppose he would have delayed giving prior to 1971 would be taxed at the same rate after 1971 by the federal government and *additionally* by the State of Vermont. It clearly would have been to appellant's advantage to give away as much as he could before 1971.

Moreover, the argument that appellant might, armed with foreknowledge, have given a larger amount of gifts prior

to 1971 is also unavailing. In opting for this alternate conduct, appellant would have been moved not by the fact that his post-1971 rate of taxation would depend on his pre-1971 giving, but rather by his foreknowledge of Vermont's general intention to tax gifts made after 1971. This suggested alternate conduct—completing transactions before they become taxable—would be induced by foreknowledge of any taxation law, even though not retroactive. Foreknowledge of the effect attributed by the Vermont gift tax to his pre-1971 gift giving would not have been a reason for appellant to increase that pre-1971 giving, for by giving more appellant would have increased his post-1971 tax rate, the consequence of which he complains. The fact that foreknowledge of other, non-retroactive, features of the gift tax might have induced this change in appellant's conduct is not persuasive on the issue of retroactive unconstitutionality. Thus we do not find that knowledge of the Vermont gift tax to be enacted would have altered appellant's gift giving plans prior to 1971.

Finally, we think that the distinction between this case and the *Untermeyer* and *Blodgett* cases, discussed *supra*, brings the Vermont gift tax law out of the arena of unconstitutional retroactivity. Here the appellant had a choice whether or not to incur any Vermont gift tax at all. He could have decided not to give gifts after 1971, or to give gifts of lesser value. Appellant argues that there is really no difference between directly taxing his past conduct and, as Vermont has done here, using that past conduct to determine what burden shall be placed on his present conduct. A similar argument was accepted by the Supreme Court of Ohio in *Lakengren, Inc. v. Kosydar*, 44 Ohio 199, 399 N.E.2d 814 (1975). In that case a corporate franchise tax was challenged on the ground of unconstitutional retroactivity. The tax rate for a given year was determined by

reference to corporate earnings of the previous year. The taxpaying corporation challenged the statute in its first year of operation as being based on events transpiring before the effective date of the statute. The Ohio court agreed, holding the statute unconstitutional.<sup>6</sup> The court found that the choice of paying the tax or ceasing to do business was really no choice at all. But we think the differences between the burdens placed on the Ohio taxpayer and appellant here justify different results. In *Lakengren, Inc. v. Kosydar*, *supra*, the tax was imposed on a going business with its attendant investment of time and money. If the taxpayer in that case had avoided the tax by going out of business, much of that past investment would have been wasted. In the case before us there has been no such investment. The fact that after 1971 it became more expensive for appellant to transfer wealth does not render his earlier gifts ineffective, nor does it greatly interfere with any comprehensive series of transactions, depriving the pre-1971 acts of value which would only have accrued at a later (post-1971) date.

Courts should be reluctant to strike down revenue-collecting statutes on grounds of denial of due process unless the statutes are arbitrary. *Wagner v. Baltimore*, 239 U.S. 207, 215-16 (1915). We have stated in Part II of this opinion that we do not find the use of past gifts to determine the current rate of taxation to be unconstitutionally arbitrary. Nor, for the reasons stated in this Part III, do we find this retroactive aspect of the Vermont gift tax law to be particularly harsh and oppressive. We therefore hold that the use of past federal gifts in computing the rate of taxation on current Vermont gifts is not a denial of due process of law.

<sup>6</sup> Ohio's constitution has an express provision prohibiting any retroactive law.

## IV.

The question remains whether the equal protection problems arising from the denial to appellant of a lifetime exemption applicable to Vermont gift taxes renders the whole gift tax structure infirm, or whether we can fashion a remedy which nullifies this unconstitutional aspect of the gift tax law while preserving the rest. 1 V.S.A. § 215 provides in relevant part:

If any provision of an act is invalid, or if any application thereof to any person or circumstance is invalid, the invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

We think we can provide guidance in the application of these statutes which will enable appellee to lawfully carry out the legislative intent of taxing gifts and estates in a coordinated manner, with reference to the federal laws governing those subjects.

We have held that the Vermont gift tax law denies equal protection because its effect is to grant a \$30,000 exemption from Vermont gift taxes to some taxpayers but not to appellant. Appellant must therefore be allowed to recompute his Vermont gift tax liability. In this recomputation the taxpayer shall be allowed to apply the amount of the exemption taken for the years prior to 1971 (\$30,000) against post-1971 Vermont gifts. After reducing the amount of gifts given in 1971 or 1972 by the amount of the exemption now available, a hypothetical federal gift tax liability should be computed with reference to the federal gift tax laws as in effect in the year for which the gift tax is being recomputed. For purposes of this part of the recomputation, the amount of the \$30,000 taken prior to 1971 should be added back into the "aggregate sum of taxable gifts." 26 U.S.C. § 2502 (1970). This is required because otherwise

appellant would receive the rate-reducing benefits of the exemption twice. The actual Vermont gift tax liability should be based on this hypothetical federal gift tax liability and calculated in accordance with 32 V.S.A. § 7412.

*This case is reversed and remanded for further proceedings in accordance with the instructions set out in this opinion. Counsel have stipulated that the 1973 gift tax paid by the appellant shall be subject to the ruling of the Court in this opinion and the Court so orders.*

FOR THE COURT:

WILLIAM C. HILL  
Associate Justice

FRED PABST, JR.      WASHINGTON SUPERIOR  
                                  COURT  
                                  vs.  
 ROBERT LATHROP,      DOCKET NUMBERS:  
                                  C147-73Wnm  
                                  C5-74Wnm  
                                  Commissioner of Taxes

### ORDER

This cause was submitted for determination by the Court upon a stipulation of fact. John D. Carbine, Esquire, and James Hirsch, Esquire, represented plaintiff, Fred Pabst, Jr., and defendant, Commissioner of Taxes, respectively.

Based upon the stipulation, the Court FINDS as follows:

1. The Petitioner is Fred Pabst, Jr. The Petitioner is a resident of Manchester Center, Vermont, and has been a resident of Vermont since prior to 1947.

2. At various times prior to January 1, 1971, Petitioner made gifts which were taxable under the United States Internal Revenue Code in the total amount of \$548,130.97, and also fully utilized (in 1947, 1948, and 1949) the \$30,000 lifetime exemption available under Section 1004(a) (1) of the Internal Revenue Code of 1939. These gifts and exemptions were as follows:

Year	Exemption	Taxable Gift
1947 .....	\$ 2,900.00	—
1948 .....	21,667.50	\$ 7,500.00
1949 .....	5,432.50	107,967.50
1950 .....	—	250.50
1951 .....	—	40,000.00
1962 .....	—	51,021.56
1969 .....	—	341,323.51
1970 .....	—	67.50
	<u>\$30,000.00</u>	<u>\$548,130.07</u>

3. During the calendar year 1971, Petitioner made additional gifts as follows to his three children, Frederick L. Pabst, Paula C. Pabst and Philip L. Pabst (the latter gift actually being to a "Section 2503(c)" trust for the benefit of Philip):

Date	Donee	Nature of Gift	Value
1/19/71 ....	Frederick	Stock of Pabst Brewing Company	\$2,917.50
1/19/71 ....	Paula	Stock of Pabst Brewing Company	2,917.50
1/19/71 ....	Philip 1955 Trust	Stock of Pabst Brewing Company	2,917.50
6/30/71 ....	Frederick	Cash	4,500.00

The proper Federal Gift Tax Liability on such gifts was \$1,159.60.

4. On or about April 13, 1973, Petitioner paid a Vermont Gift Tax in the amount of \$347.88 on his 1971 gifts, representing 30 percent of his Federal Gift Tax Liability as described above. A copy of his 1971 Vermont Gift Tax Return is attached hereto as Exhibit A.

5. During the Calendar year 1972, Petitioner made additional gifts as follows to his children:

Date	Donee	Nature of Gift	Value
1/21/72 ....	Frederick	Stock of Pabst Brewing Company	\$ 3,150.00
1/21/72 ....	Paula	Stock of Pabst Brewing Company	3,150.00
1/21/72 ....	Philip	Stock of Pabst Brewing Company	3,150.00
9/05/72 ....	Philip 1955 Trust	Stock of Pabst Brewing Company	428,662.50
9/05/72 ....	Philip Trust No. 1	Stock of Pabst Brewing Company	1,878,837.50

The proper Federal Gift Tax Liability on such gifts was \$768,879.04.

6. On or about April 13, 1973, Petitioner paid a Vermont Gift Tax in the amount of \$230,663.71 on his 1972 gifts, representing 30 percent of his Federal Gift Tax Liability, as described above. A copy of his 1972 Vermont Gift Tax Return is attached hereto as Exhibit B.

7. Petitioner has filed a timely Petition for Refund for the 1971 and 1972 Vermont Gift Taxes paid by him as described above.

Based on the above findings, the court concludes as follows:

The Legislature may impose a tax on current gifts at rates determined, in part, by past transactions.

The Vermont Gift Tax is constitutional because it applies only to taxable gifts made after its effective date at which time a donor is charged with knowledge that a tax will be incurred. The donor must also have knowledge of the applicable rates.

Based on these conclusions, the appeals must be denied.

Dated at Burlington, Vermont, the County of Chittenden, this 23rd day of November, 1976.

/s/ JOHN P. MORRISSEY  
Honorable John P. Morrissey  
Superior Judge

/s/ WILLIS C. BRAGG

/s/ MARILYN M.

IN THE  
SUPREME COURT OF THE STATE OF VERMONT

FRED PABST, JR.,

vs.

ROBERT LATHROP,  
COMMISSIONER OF TAXES,

*Appellant,*

*Appellee.*

Docket No. 355-76

**NOTICE OF APPEAL TO THE  
SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that Fred Pabst, Jr., the Appellant above named, hereby appeals to the Supreme Court of the United States from those portions of the final judgment of the Supreme Court of Vermont entered on June 6, 1978 affirming the denial of the Appellant's petition for refund of gift taxes and that portion of the judgment remanding the case to the Washington Superior Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Charles T. Shea  
Attorney for Appellant

**TITLE 32. TAXATION AND FINANCE**  
**CHAPTER 190. ESTATE AND GIFT TAXES**

**Subchapter 1. Purpose; definitions**

**PURPOSE**

**Sec. 7401.** (a) This chapter is intended to conform the Vermont inheritance tax laws with the estate and gift tax provisions of the United States Internal Revenue Code, except as otherwise expressly provided, in order to simplify the taxpayer's filing of returns, reduce the taxpayer's accounting burdens, and facilitate the collection and administration of these taxes.

(b) It is intended that taxpayers shall be taxed only upon the Vermont taxable estate or upon Vermont taxable gifts for any calendar year, but that the rate at which the Vermont taxable estate or Vermont taxable gifts are taxed under this chapter shall reflect the taxpayer's ability to pay as measured by the value of his federal taxable estate or federal taxable gifts for the taxable year.

**Subchapter 2. Gift tax**

**NAME OF TAX**

**Sec. 7411.** The tax imposed by this subchapter shall be known as the Vermont gift tax.

**IMPOSITION OF TAX**

**Sec. 7412.** For the calendar year 1971 and for each calendar year thereafter a tax is imposed upon the transfer of property by gift during such calendar year by any individual, resident or nonresident. The amount of this tax shall be measured by 30 percent of the federal gift tax liability of the taxpayer for the calendar year, reduced by a percentage equal to the percentage of all of the taxpayer's

transfers by gift for the calendar year which are not Vermont gifts. However, in the case of gifts made after December 31, 1976, but before January 1, 1979, the amount of the tax imposed above by the first two sentences of this section shall be reduced by the percentage which \$60,000 is of the amount of the federal taxable gifts, but shall not be reduced by more than 100 percent. In the case of gifts made after December 31, 1978, the amount of the tax imposed above by the first two sentences of this section shall be reduced by the percentage which \$120,000.00 is of the federal taxable gifts, but shall not be reduced by more than 100 percent. [1976, No. 183, § 1.]

Act No. 183, L. 1976, s. 1, effective July 1, 1976, added the last two sentences.

**DETERMINATION OF TAXABLE GIFTS  
OR ESTATE AND GIFT AND ESTATE  
TAX LIABILITY UNDER THE LAWS  
OF THE UNITED STATES**

**Sec. 7492.** For purposes of this chapter, a taxpayer's taxable gifts or taxable estate or gift or estate tax liability under the laws of the United States shall be determined by reference to the judicial decisions and administrative rulings of the United States.

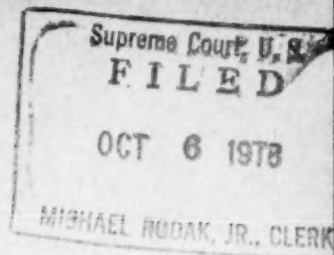
(1) A determination by the United States which establishes the amount of a taxpayer's taxable gifts or taxable estate or gift or estate tax liability under the laws of the United States shall be binding on the taxpayer and the state in calculating the taxpayer's liability to Vermont under this chapter. For purposes of this section, "determination by the United States" means:

(A) A decision by the Tax Court of the United States or a judgment, decree or other order by any United States court of competent jurisdiction which has become final.

(B) A closing agreement under section 7121 of the Internal Revenue Code of 1954.

(2) For any taxable year, the payment to the United States by any taxpayer of an aggregate amount of gift or estate tax, whether under a claim of deficiency, demand or otherwise, and whether under protest or otherwise, shall be prima facie evidence, for purposes of this chapter, that the aggregate amount, less any refunds received by the taxpayer from the United States with respect to gift or estate tax payments for that year, as the case may be, constitutes the gift or estate tax liability of the taxpayer under the laws of the United States, and that the items of gifts or of an estate, or of income, deductions, exemptions and credits with respect to which the gift or estate tax liability was calculated are the items of gifts or of an estate, or of income, deductions, exemptions and credits of the taxpayer under the laws of the United States.

(3) For purposes of this section, the affidavit of any United States district director of internal revenue that a taxpayer (A) has paid a specified aggregate amount of gift or estate tax, (B) has received a specified amount of refund with respect to his gift or estate tax payments, or (C) has paid any amount of tax calculated with respect to specified items of gifts or of an estate, or of income, deductions, exemptions or credits, shall be prima facie evidence of the truth of those matters set forth in the affidavit.



IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1978  
No. 78-376

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FRED PABST, JR., Appellant,  
v.  
VERMONT COMMISSIONER OF TAXES,  
Appellee

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On Appeal from the Supreme Court of the  
State of Vermont

STATEMENT OPPOSING JURISDICTION  
AND MOTION TO DISMISS OR AFFIRM

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IN THE  
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FRED PABST, JR., Appellant,  
v.  
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Appellee.

---

STATEMENT OPPOSING JURISDICTION  
AND MOTION TO DISMISS OR AFFIRM

The Appellee in the above-entitled case moves the Court to dismiss this appeal or, in the alternative, to affirm the decision of the Vermont Supreme Court on the ground that this appeal presents no substantial Federal question.

SUMMARY OF THE ISSUES

In 1970 the Vermont Legislature enacted a Vermont gift tax imposed on Vermont taxable gifts made on or after January 1, 1971. The Vermont gift tax is measured by 30% of Federal gift tax liability.

On January 1, 1971, the Appellant's marginal Federal gift tax rate was determined by the cumulative total of his pre-1971 taxable gifts, which reflected the fact that the Appellant had previously claimed his \$30,000 lifetime exemption. Accordingly, the Federal tax rate applicable to the Appellant's 1971 taxable gifts and, therefore, his 1971 Federal gift tax liability, reflected his Federal gift tax history. Because the Appellant's Vermont gift tax was measured by 30% of his Federal gift tax liability, his Vermont gift tax likewise reflected his pre-1971 Federal gift tax history. In a similar manner, the Appellant's 1972 and 1973 Vermont gift tax liabilities reflected his pre-1971 Federal gift tax history.

Based on the fact that his Vermont gift tax liabilities were different from those of a hypothetical taxpayer making identical Vermont taxable gifts but having a different Federal gift tax history, the Appellant claims that the Vermont law violated his rights guaranteed under the United States Constitution. Specifically, the Appellant claims that the Vermont gift tax is retroactive and that its incorporation by reference of the Federal gift tax law deprives him of his property without due process of law. The Appellant also claims that because the decision of the Vermont Supreme Court from which he appeals is legislative in nature the decision itself violates his Federally guaranteed right to due process of law. Finally, the Appellant claims that both the legislative nature of the decision below and the reference to Federal tax laws incorporated in the Vermont gift tax law violate his Federally guaranteed right to a republican form of government.

#### ARGUMENT

The Decision Below is Supported by Independent and Adequate Non-Federal Grounds. This Court has consistently required, as a prerequisite to accepting jurisdiction, that a substantial Federal question be properly raised in the proceedings below and that a decision on the Federal question was necessary to the determination of the Court below. To be properly raised, claims presenting Federal questions must be brought to the attention of the lower court with fair precision and in due time. Street v. New York, 394 U.S. 576, 584 (1969).

In determining whether a properly raised Federal question was necessarily decided by the the court below, this Court has required that the Federal question be clearly distinguished from similar state questions at issue. Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 865-6 (1974). Where adequate and reasonable state grounds are asserted, and the particular Federal question is not clearly raised, jurisdiction has been declined. As this Court said in Durley

v. Mayo, 351 U.S. 277, 281:

"..., petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below."

It is respectfully suggested that on the record before this Court, independent, adequate and reasonable state grounds for the decision below are presented. Furthermore, the Appellant has failed to properly raise in the proceedings below some of the Federal questions asserted on this appeal.

1. The decision of the Vermont Supreme Court that the Vermont gift tax is not unconstitutionally retroactive is based on the Vermont Constitution.

The Appellant argued in the Vermont Supreme Court that "the Vermont gift tax law violates the due process provisions of the Vermont and Federal Constitutions." Appellant's Reply Brief, at page 1. There is nothing in the record to support the conclusion that the Appellant brought to the attention of the court below, with fair precision, his claimed

right to Federal due process as distinguished from state due process.

Furthermore, the state constitutional grounds supporting the decision below are clearly independent, adequate and reasonable. While the Vermont Constitution contains no article which paraphrases §1 of the XIVth Amendment, the guarantees of due process of law are secured under Chapter 1, Articles 4, 9 and 10. While the Appellant's Jurisdictional Statement suggests that the decisions below focused on §1 of the XIVth Amendment, a careful reading of that decision reveals no differentiation between due process rights arising under the Federal Constitution and due process rights arising under the state constitution.

It is respectfully suggested that the Court should decline jurisdiction on the additional ground that any substantial Federal question presented has been previously decided by this Court. A gift tax is a transaction tax. Bromley v. McCaughn, 280 U.S. 124 (1929). Because the Vermont tax at issue was imposed only

on gift transactions occurring after its effective date, the tax is not retroactive within the holdings of Blodgett v. Holden, 275 U.S. 142 (1927) or Untermeyer v. Anderson, 276 U.S. 440 (1928). The Vermont Supreme Court correctly described the operation of the Vermont gift tax, stating:

"Under the Vermont gift tax law, pre-1971 gifts affect the rate at which post-1971 gifts will be taxed, but they are not themselves subject to a tax."

The decisions of this Court have consistently upheld the constitutionality of retroactive elements of otherwise valid taxes. As this Court said in United States v. Manufacturers National Bank of Detroit, Executor, 363 U.S. 194, 200 (1960):

"It is not material that the policies were purchased and the policy rights were assigned before the statute was enacted. The tax is not laid on the creation or transfer of the policy rights, and it 'does not operate retroactively merely because some of the facts or conditions upon which its application depends came

into being prior to the enactment of the tax.' United States v. Jacobs, supra (306 U.S. at 367)."

Although the tax upheld was the estate tax, the rationale applies with equal force to the companion tax on transfers of wealth, the gift tax.

2. The Authority of the Vermont Supreme Court to Construe a Statute to Avoid Unconstitutional Results is Clearly Derived from State Law.

Preliminarily, it should be noted that the Appellant's Motion for Reargument and supporting memorandum, raised no constitutional issues. For this reason alone this Court should decline jurisdiction as no issue can properly be asserted on this appeal which was not properly raised below.

Furthermore, the decision of the Vermont Supreme Court is supported by the Vermont Constitution and specifically based on 1 V.S.A. §215, a clearly independent, adequate and reasonable state ground.

While the Appellant here claims some unspecified Federally protected right to

due process was violated, neither the right transgressed nor the transgression complained of has been raised with fair precision either in its proceedings below or in Appellant's Jurisdictional Statement.

3. The Vermont Legislature was authorized to incorporate by reference provisions of the Federal gift tax law by the Vermont Constitution and Statutes.

In his initial petition to the Commissioner, the Appellant argued only that the Vermont Constitution prohibited the delegation complained of. He made no argument that a Federally protected right was involved, much less infringed upon. The Commissioner specifically rejected the Appellant's claim under the Vermont Constitution.

Appeals from a Commissioner's Determination are true appeals on the record, as distinguished from trials de novo. Rule 74(c) of the Vermont Rules of Civil Procedure and 3 V.S.A. §§815 and 809(e). It is established practice in Vermont that appellate review is limited to the record on appeal and that an appellate court will not consider issues

not raised in the proceedings below. As stated in Monti v. Village of Northfield, 135 Vt. 97, 99, 369 A.2d 1373 (1977):

"Points not raised in the proceedings before the lower court will not be considered for the first time on appeal. (Citation omitted.)"

See also LaFountain v. Vermont Employment Security Board, 133 Vt. 42, 48, 338 A.2d 468 (1974), and Laird Properties v. Mad River Corp., 131 Vt. 268, 282, 305 A.2d 562 (1973).

Contrary to this rule, on appeal the Appellant asserted a violation of Article IV, §4, of the United States Constitution. The Vermont Supreme Court never reached this newly asserted constitutional issue but rather dismissed the Appellant's claim for lack of standing based, in part, on its conclusion that the Appellant failed to show any protected right which was unfavorably affected. It is respectfully suggested that the Appellant's argument is foreclosed, because he failed to properly raise the issue below.

Even if this issue was properly raised, the decision below is clearly governed by the Vermont Constitution,

Chapter I, Article 15, which provides:

"The power of suspending the laws, or the execution of laws, ought never to be exercised but by the Legislature, or by authority derived from it, to be exercised in such particular cases, as this Constitution, or the Legislature shall provide for."

Furthermore, Chapter II, Articles 1, 2 and 3, of the Vermont Constitution specifically distribute and delegate the powers of government among the Legislative, Executive and Judiciary branches. Because of the framework therein provided, the question of delegation is purely a local matter.

Article 4, §4 of the U.S. Constitution has no application to this case.

As noted in Sections 2 and 3 of this Motion, supra, the Appellant failed to properly raise any Federal constitutional issue to support his claim of unconstitutional delegation or the unconstitutional judicial legislation by the decisions below.

Even if consideration of Article 4, §4 of the United States Constitution is

properly before this Court, Chapter 1, Articles 5 and 15 of the Vermont Constitution, which assure comparable guarantees, provide an adequate, independent and reasonable state grounds for the decision below.

Additionally, as Appellant has noted, the Court has been reluctant to involve itself in issues arising under the "guarantee provision." Jurisdictional Statement at page 15. It is respectfully submitted that the issues presented by this case are not such as to compel the Court to abandon its traditional approach to petitions based on Article IV, §4, of the United States Constitution.

## CONCLUSION

Wherefore, Appellee respectfully submits that no substantial Federal question is presented by this appeal and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Vermont Supreme Court.

Respectfully submitted,

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Deputy Attorney General  
Counsel for Appellee